Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Effect of Foreign Mobile Termination Rates on U.S. Customers	)	IB Docket No. 04-398

COMMENTS OF CABLE & WIRELESS PLC

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I. SUMMARY

C&W is pleased to provide a response to the Commission's Notice of Inquiry into the Effect of Foreign Mobile Termination Rates on U.S. Customers.[1] C&W is a major carrier of mobile traffic and pays call termination charges to mobile network operators around the world; therefore this NOI is extremely relevant to our businesses.

Many of C&W's National Telco Business Units operate mobile networks and have revenue streams from mobile call termination. Since our response to the International Settlements Policy Reform in January 2003, there have been significant liberalisation developments in those regions and all but a handful of the territories in which we operate have fully liberalised their telecommunications markets. C&W therefore pays mobile termination charges to competing mobile networks.

C&W believes that in "calling party pays" regimes, each mobile network operator has market power in traffic termination on its own network. Although the variable costs of termination may be modestly higher than on fixed networks, mobile operators in many foreign jurisdictions have used this slightly higher cost as a pretext for demanding exorbitant rates, including some rates that exceed the applicable settlement rate benchmark on the route. Surcharges for mobile termination over and above what is paid for traffic terminated on the fixed network are now commonplace.

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[1] We note this submission draws on a previous C&W submission made to the FCC on 14 January 2003 on International Settlements Policy Reform IB Docket No. 02-324 and International Settlement Rates IB Docket No. 96-261.

C&W recommends that the FCC undertake two actions to address this issue. First, the Commission should monitor and enforce the current requirement in 47 C.F.R. § 42.10(b) that U.S. international carriers publish a full listing of international rates on their websites, including any mobile surcharges. The Commission should also monitor these rates to ensure that as foreign mobile rates begin to decline, these cost reductions are passed on to U.S. consumers promptly. Second, many national regulators and international agencies, such as the European Commission, have taken and are taking direct action to regulate mobile call termination. C&W encourages the Commission to continue to advise foreign regulators on the United States' experience in setting mobile interconnection rates as foreign governments study this issue in their own jurisdictions. Although the Commission may wish to consider more prescriptive actions in the future if this problem persists, C&W believes that the Commission should first give foreign governments the opportunity to correct the problem.

Whilst we welcome the opportunity to contribute to this NOI, C&W does have concerns that the FCC lacks the authority to adopt benchmarks, or otherwise to prescribe the rates, that US carriers pay when they terminate US-billed traffic on foreign mobile networks. In the appeal of the FCC's original order establishing benchmark settlement rates for traffic terminating on fixed foreign networks, the U.S. Court of Appeals for the D.C. Circuit declined to confirm the FCC's authority to adopt benchmarks that conflict with the regulations or rate prescriptions of a foreign regulatory authority. See Cable & Wireless plc v. FCC, 166 F.3d 1224, 1230 (1999) ("we see no need to decide" whether the FCC can adopt a benchmark which "subjects foreign carriers to conflicting obligations"). Unlike international calls terminating on fixed networks, which foreign regulatory authorities may well not regulate or prescribe, the termination rates for calls terminating on mobile networks are often actively regulated and frequently prescribed by foreign regulatory authorities.[2] Hence, any effort by the FCC to specify the applicable termination rate for international calls originating in the US and terminating on foreign mobile networks would inevitably subject certain foreign carriers to conflicting legal requirements. It would violate both applicable ITU treaty requirements, as well as established precepts of international comity, for the FCC to precipitate such a conflict with foreign regulatory bodies. In addition, US courts have long interpreted Federal statutes in such a way as to "protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); see also Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 174 (1993). Any FCC decision mandating a specific rate for calls terminating on a foreign mobile network would create precisely the kind of jurisdictional "clashes" that courts have sought for decades to prevent through narrowing interpretations of federal statutes.

A. MOBILE TERMINATION RATES ARE EXCESSIVE IN MANY JURISDICTIONS

In the *NOI* (at ¶¶ 6-12), the Commission seeks comment on the high mobile interconnection rates that certain foreign carriers are imposing on U.S.-outbound calls to countries with "calling party pays" regulatory regimes. The significance of "calling party pays" is that in countries where such a system exists, mobile operators have market power over call termination. Although retail mobile markets in many foreign countries are regarded as competitive because two or more facilities-based operators compete for the business of customers, this does not mean that the call termination markets are fully competitive. The call recipient carrier has few or no incentives to limit termination rates, while the network initiating the call must pay the terminating carrier's

[2] This is a generalisation and not strictly applicable in all jurisdictions.

rates if it desires to complete the call. The market for the termination of calls is that of the single operator on which the call is terminated.[3] C&W notes the Commission's comments on the possible alternative market definition proposed by Charles Rivers Associates, where they define the relevant market as that for a basket of retail mobile services, including access, outgoing calls and incoming calls. C&W is not persuaded by this alternative definition and believes that it does not stand up to scrutiny when the accepted methodologies for market definition, which focus on demand and supply side substitutability, are applied. In particular, under the calling party pays regime, there can be no response on the demand side in response to a significant price increase that would constrain excessive mobile termination rates as the calling party exerts no control over the choice of the network and the called party (who chooses the network) is, typically, unconcerned about costs that are borne by other parties and only concerned by costs that he has to bear. By contrast, there will be constraints on the demand side for the other parts of the basket as the price of these services will be taken into account by the called party when choosing the mobile network. It is notable that the alternative market definition proposed by Charles Rivers Associates has been considered at great length in the UK and has been firmly rejected. [4]

Therefore, C&W believes that the single network operator market definition is the appropriate definition and this implies that effective competition in the call termination market does not

[3] This conclusion on market definition has also been supported by a number of competition and regulatory bodies elsewhere, including the UK Competition Commission ("Vodafone, O_2, Orange and T-Mobile, Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O_2, Orange and T-Mobile for terminating calls from fixed and mobile networks, December 2002") and, more recently, the European Commission ("EC") which considered mobile termination as part of the new European Regulatory Framework and defined the relevant economic market as "voice call termination on individual mobile networks". (See "Commission recommendation 2003/311/EC of 11 February 2003 on relevant product markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services").

[4] Competition Commission (2002), op cit.

exist, and mobile operators have both the incentive and ability to charge above-cost termination rates.

The Commission has made similar findings that non-incumbent local exchange carriers ("LECs") in the United States, while not being classified as dominant carriers, nevertheless possess some market power over terminating interstate access charges. In particular, the Commission has held that the "terminating access markets consist of a series of bottleneck monopolies over access to each individual end user."[5] In order to limit excessive pricing of termination services, the Commission adopted access charge benchmarks to limit the ability of terminating LECs to use FCC-filed tariffs to impose excessive rates on other carriers. The fact that foreign mobile operators can charge rates demonstrably far in excess of costs without any significant loss of business is evidence that they possess the same type of market power as terminating LECs in the United States. As the number of mobile users has continued to grow, the market has not been able to remedy this failure.

B. THERE ARE REGULATORY PROCEEDINGS IN SOME JURISDICTIONS TO DECREASE THE COST OF MOBILE TERMINATION

There have been a number of public consultations in important jurisdictions on the comparative costs and pricing of fixed versus mobile network termination, and the consensus conclusion has been that mobile termination rates are excessive. In the United Kingdom, for example, a year-long inquiry by the Monopolies and Mergers Commission[6] (now renamed the "Competition Commission") resulted in it agreeing with the U.K. regulator ("OFTEL") that price controls on

5 *See AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 12,312, ¶21 (2001) (citing *Access Charge Reform*, 16 FCC Rcd 9923, ¶¶ 30-32 (2001)).

6 *Cellnet and Vodafone: Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Cellnet and Vodafone for terminating calls from fixed-line networks*, Monopolies and Mergers Commission, January 1999. Available at: http://www.competition-commission.org.uk/reports/421cellnet.htm #full

mobile termination rates were necessary. These were imposed in 1999 on Vodafone and mmO2 (previously called BTCellnet). OFTEL reviewed the issue in 2001,[7] and concluded that there were separate markets for call termination on each of the mobile operator's networks; that each mobile operator was dominant with respect to termination of calls on its own network and was charging excessive termination rates. It further concluded that the appropriate remedy was to continue with price controls and to extend these to all four mobile operators--Vodafone, mmO2, Orange and T-Mobile (previously named One2One). Following the mobile operators' refusal to accept OFTEL's findings, the matter was again referred to the Competition Commission. It initiated its investigation in January 2002 and published its conclusions in December 2002.[8] The Competition Commission agreed with OFTEL's findings that the mobile termination charges of Vodafone, mmO2, Orange and T-Mobile were excessive and against the public interest. It therefore concluded that the appropriate remedy was to place a price cap on the termination charges of all four operators, with the price cap based on LRIC plus an appropriate mark-up for common costs. Similarly, in July 2001, the Australian Competition and Consumer Commission ("ACCC") concluded that mobile termination rates in Australia were excessive.[9]

Mobile termination was also identified as a "candidate market" by the European Commission in its 2003 Recommendation[10] on markets that may require ex ante regulation. The individual

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7 *Review of the Charge Control on Calls to Mobiles*, OFTEL, 26 September 2001. Available at: http://www.oftel.gov.uk/publications/mobile/ctm0901.htm

8 [8] Competition Commission (2002), op cit

9 C&W would like to emphasize, however, that it does not support the remedy imposed by the ACCC, which was to link changes in the termination access prices to changes in the prices of mobile retail services (for example, calls from mobile). C&W believes that linking changes in prices in this way has perverse incentives in that it will make it less likely that network operators will compete strongly on retail prices, as they will recognise that this will result in lower termination prices too. The result is likely to be reduced competition in all the markets linked in this way.

[10] Commission recommendation 2003/311/EC , op cit.

National Regulatory Authorities (NRAs) of the countries of the European Union were then tasked with considering the particular conditions of competition in the supply of mobile termination and determining whether regulatory action was required. Some countries have yet to complete their analysis, whilst other countries have reached their conclusions but have yet to implement them. In summary, the UK has implemented a price control based on LRIC; France has recommended a price control (with a possible move to LRIC in the future); Greece has recommended a "glide path" to reduce termination rates; whilst Austria, Ireland and Sweden have recommended that termination rates are subject to a requirement to be cost orientated (which in the case of Ireland and Sweden implies LRIC for the main mobile operators).

These consultations treat the problem of excessive mobile termination within the broader regulatory context of domestic interconnection. We do not know of a foreign regulator that has reviewed and passed judgment on the appropriateness of the existing level of rates for terminating international inbound traffic on mobile networks.

The actions in the United Kingdom, Europe and Australia can be expected to set a precedent in other jurisdictions. Furthermore, C&W expects that as the proportion of international traffic destined for foreign mobile users increases, foreign mobile operators will come under increasing pressure to reduce rates. In the context of domestic interconnection, the fixed network operators will find net payments to mobiles increasing, raising their financial incentive to impose commercial, regulatory and political pressure for lower rates. In the international context, the increasing proportion of calls that are terminated on foreign mobile networks may begin to generate benchmark compliance issues. As volume-weighted average international settlement cost (including the mobile termination rate) begins to bump up against the benchmark ceiling further pressure will be placed on the foreign mobile operator to lower its rates and on the foreign regulator to ensure that this occurs in a timely fashion (although, this will not occur in the Caribbean as mobile settlement rates themselves, though higher than fixed, are already below benchmarks). The foreign fixed network operators are likely to become the best advocates for solving the problem of mobile termination.

C. THE FCC SHOULD NOT TAKE PRESCRIPTIVE ACTIONS AT THIS TIME

We believe it is too soon for the FCC to take any prescriptive actions and that any such actions are likely to be ineffectual at this time in reaching the root cause of the problem of high mobile termination rates. First, as noted above, many foreign regulators in jurisdictions with the "calling party pays" system have become aware of this problem and are taking action. We have already cited examples from the United Kingdom and Australia in this submission. Regulators in Jamaica and Panama have also taken action to control mobile termination charges. In fact, C&W expects that nearly every jurisdiction within which a C&W affiliate operates will have a regulatory consultation on mobile termination within the next few years, most within two years.

Actions to lower domestic mobile termination rates, in turn, are likely to bring down the rates for terminating international traffic. Often foreign mobile operators do not distinguish between domestic and international traffic in their termination rates. As a result, any decline in domestic termination rates will directly and immediately redound to the benefit of carriers sending inbound international traffic to the foreign mobile network. Even where mobile operators seek to maintain a higher termination rate for international calls than domestic calls, they would increasingly face bypass activities as U.S. international carriers would begin routing their calls through domestic carriers in the foreign country. Just as illegal bypass forced down the settlement rates by taking traffic off the higher priced traditional bilateral channels, so would traffic inbound to mobiles find its way off international circuits to lower priced domestic links.

For the avoidance of doubt, Cable & Wireless does not condone bypass which is illegal in many of the territories in which Cable & Wireless operates and indeed we are swift to take action and assist our host governments, where necessary, to prevent the illegal bypass of licensed networks.

This situation is decidedly different from the international settlements rate regime. In that context, there was frequently no domestic equivalent to the settlement rates that foreign telecommunications carriers imposed on U.S. carriers to terminate inbound international calls. As a result, the Commission could not rely upon foreign domestic commercial, regulatory and political forces to ensure reasonable settlement rates, and was forced to take action through its benchmark policies.

Second, it is clear that in many cases U.S. carriers have sufficient leverage in negotiations to win termination rates that are below what the local fixed networks can win from mobile carriers in the foreign market. See, for example, the Caribbean rates presented in the Appendix.

Third, driven by U.S. carrier pressure and other market forces pushing down international termination rates, even at benchmark levels, foreign telecommunications carriers will face losses if they are not able to obtain commensurate reductions in mobile termination rates. These carriers can be relied upon to take all commercial, regulatory and political actions necessary to ensure reasonable mobile termination rates, and they may well prove successful in getting local regulators to act.

Finally, C&W is not convinced that direct action by the Commission would necessarily be effective in reducing foreign mobile termination rates. In C&W's experience, mobile operators often do not correspond directly with originating U.S. international carriers. Rather, calls are sent to the foreign telecommunications carrier, which in turn transmits the calls to the mobile operator (often an unrelated company, or operated as a separate profit center). FCC action taken to prevent U.S. carriers from paying excessive mobile termination rates would, in the first instance, often put the foreign correspondent carrier in a squeeze. These fixed operators would need to lower mobile interconnection rates either through negotiation, regulatory intervention, threats of non-delivery of traffic, or a combination of these methods.

Furthermore, the incentives of the international operators might be different in the case of a new Commission order directed against excessive foreign mobile termination rates. In contrast to the situation with the original benchmarks order, in which international operators faced losing their entire revenue stream associated with U.S. inbound traffic in the case of non-compliance, international operators would have the option of simply declining to carry any traffic destined for the foreign mobile network. As a result, direct action by the Commission could result in disruption of service delivery for calls to foreign mobiles. This might be less beneficial to U.S. consumers than the process of allowing local market forces and regulatory action to lower the cost of mobile termination rates.

D. ACTIVITIES THE FCC CAN ENGAGE IN TO ADDRESS THE ISSUE OF HIGH MOBILE TERMINATION RATES

Although C&W does not believe the FCC should take prescriptive actions at this time, C&W recommends that the Commission undertake actions designed to (a) ensure that U.S. consumers know about surcharges due to foreign mobile termination rates; and (b) encourage other regulators to address the issue of domestic fixed-to-mobile termination in their own jurisdictions.

C&W supports the Commission's current rules requiring U.S. international carriers to publish their international calling rates, including mobile surcharges, on their websites. See 47 C.F.R. § 42.10(b). Even with cost-based foreign mobile termination rates, the cost of calling a foreign mobile network may always be somewhat higher than the cost of calling a foreign fixed network,[11] and U.S. consumers should be made aware of these differences. C&W urges the Commission to make sure that all U.S. international carriers comply fully with the existing website disclosure obligations, and that such information is easy to find on their respective websites. C&W also urges the Commission to monitor the pricing practices of U.S. carriers to see that surcharges for mobile termination begin to decrease across the globe as mobile termination rates do. This may be a concern on thin routes where competition may not be relied upon to force collection rates to cost promptly or in an appropriate amount.

C&W supports the Commission encouraging regulators, in countries where mobile interconnect rates are clearly excessive, to revisit how those rates are set. Currently, there are instances where carriers face unreasonable interconnection rates due to long contractual arrangements. Foreign governments should be encouraged to develop arbitration mechanisms or fora in which carriers facing these burdensome contractual obligations can raise their concerns. In addition, the FCC can work with those foreign countries that are signatories to the *WTO Reference Paper on Basic Telecommunications* to comply with their commitments with regard to interconnection.[12] According to Section 2.2(b) of the *Reference Paper*, interconnection is to be ensured and provided "in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided." Further

[11] Mobile networks typically have higher traffic sensitive costs, but lower non-traffic sensitive costs (*i.e.*, costs vary with volume of calls).

[12] *E.g., Comptel's Section 1377 Comments to the Office of the United States Trade Representative Re: Brazil, China, Colombia, France Germany, India, Ireland, Japan, South Africa and Switzerland; WTO General Agreement on Trade in Services*, ¶¶ 4-6 (January 9, 2003).

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opportunities exist for raising the issue of high cost of mobile interconnection with foreign governments that have not yet made WTO commitments but are engaging in liberalisation discussions or through U.S. bilateral trade negotiations.

II. CONCLUSION

For the foregoing reasons, C&W submits that the Commission should continue the process of ISP deregulation begun in the *ISP Reform Order*, and that the Commission should take measured actions, although not prescriptive actions, to help procure reductions in excessive foreign mobile termination rates.

Respectfully submitted,

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APPENDIX

Country/Region	INTL MTR (US$) per min	Domestic MTR
OECS	0.1375	0.205-0.227
Jamaica	0.138*	0.085**
Cayman	0.108	0.23
Barbados (still non CPP)	Zero (TBD with intl liberalisation	0.15, Mobile to Mobile only/ zero for fixed

* Implemented Jan 2004 was previously 0.09
** Implemented by Digicel Sept 2003 was previously an average of 0.20 to their network